

# LAND COURT OF QUEENSLAND

CITATION: *Body Corporate for Parklands CTS and Anor v. Department of Natural Resources and Water* [2009] QLC 0065

PARTIES: Body Corporate for Parkland CTS and Body Corporate for 3,4,5,6 and 7 Parkland Boulevard (applicants)

v.

Chief Executive, Department of Natural Resources and Water (respondent)

FILE NO: AV2009/0010

DIVISION: Land Court of Queensland - General Division

PROCEEDING: Hearing of an application

DELIVERED ON: 19 May 2009

DELIVERED AT: Brisbane

HEARD AT: Brisbane

MEMBER: Mr RS Jones

ORDER: **1. Application refused.**  
**2. The Court does not have jurisdiction to hear and decide appeal AV2009/0010.**  
**3. I will hear from the parties as to costs.**

CATCHWORDS: Practice and Procedure – Failure to file notice of appeal in time – whether reasonable excuse exists for failure to file in time – *Valuation of Land Act 1944*, sections 45 and 57 - hearsay evidence - best evidence - equity and good conscience provisions of *Land Court Act 2000* considered.

APPEARANCES: Mr B Cronin of Counsel instructed by Courtice Neilsen Lawyers, for the applicants.  
Mr Fynes-Clinton of Counsel instructed by Mr P. Prasad, Senior Legal Officer employed by the respondent, for the respondent.

## Background

- [1] The issue for determination in this application is whether the Court has the jurisdiction to hear an appeal in circumstances where the notice of appeal was filed some 6 months out of time.
- [2] On 30 April 2008 the applicants objected to the valuation purportedly appealed against.<sup>1</sup> On the front sheet of the objection the postal address for any response to the objection is given as “C/- Ernst Body Corporate Management Pty Ltd. 33 Mein Street, Spring Hill, QLD 4000”. By correspondence headed “*Decision on Objection*”, on 24 June 2008 the respondent advised the applicants that their objection had been disallowed. The decision on objection was addressed to a number of entities including the applicants here, care of Ernst Body Corporate Management Pty Ltd (the first managers) at the address referred to above.<sup>2</sup>
- [3] A notice of appeal against the decision to disallow the objection dated 16 January 2009 was filed in the registry of the Land Court on that date.<sup>3</sup>
- [4] Section 45 (2) of the *Valuation of Land Act 1944* (VLA) relevantly provides:
- “(2) Except as hereinafter by this section provided, an appeal shall not lie unless it is instituted within 42 days after the date of issue to the owner concerned by the chief executive of notice of the chief executive’s decision upon the objection (which date of issue shall be stated in such notice)”.
- [5] On the face of it, the appeal was filed some 6 months after the time provided for under section 45(2).
- [6] Subsection 9 of section 45 relevantly provides that section 57 of the Act applies with any necessary changes to an appeal under section 45.
- [7] Section 57, under the heading “*Late filing*” provides:
- “1. If a notice of appeal is filed in the Land Court registry after the time stated in section (45(2)), the registrar of the court must notify the owner that the appeal may not be heard unless the owner satisfies the court that the owner has a reasonable excuse for filing the notice after the time stated.
- Example of reasonable excuse –
- The notice of the chief executive’s decision or the notice of appeal was lost or delayed in the ordinary course of post.”

## The Evidence

- [8] In support of their case that a reasonable excuse exists, the applicants rely on the affidavit of Mr Sindel, a Solicitor employed by Courtice Neilsen Lawyers. Mr Sindel is the Solicitor who now has the carriage of this appeal. Mr Sindel was not retained by the applicants until late 2008 after the date for the filing of the appeal had passed.

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<sup>1</sup> Exhibit BJS-1 to the affidavit of Mr Sindel, Exhibit 1.

<sup>2</sup> Part of Exhibit BJS-3 to the affidavit of Mr Sindel, Exhibit 1.

<sup>3</sup> Exhibit BJS-4 to the affidavit of Mr Sindel, Exhibit 1.

[9] After being retained by the applicants, on 15 December 2008 Mr Sindel wrote to the respondent requesting a response to the applicants' notice of objection. On 22 December 2008 the respondent replied enclosing a copy of the decision on objection notice.<sup>4</sup>

[10] Following receipt of that correspondence Mr Sindel, in early 2009, made certain inquiries concerning that decision notice. In paragraphs 7 and 8 of his affidavit Mr Sindel deposes to the following facts and circumstances:

“7.1 I am informed by Michael Lovell of Ernst Body Corporate Management Pty Ltd and verily believe that he has checked their files and records in relation to the Parklands properties and they have no record of having received the Department’s decision notice dated 24 June 2008.

7.2 I am further informed by Michael Lovell and believe that any notices they do receive in respect of buildings they no longer manage are sent to the new body corporate manager by post the day following their receipt by Ernst Body Corporate Management.

7.3 I am informed by Conrad Beal of Archers Body Corporate Management Pty Ltd that he has conducted a search of their files and records for the Parklands’ Bodies Corporate and they have no record of having received the Department’s decision notice date 24 June 2008.

7.4 I am informed by Eric Leese the Chairman of the Parklands' Principal Body Corporate and verily believe that they have conducted a search of their files and records and have not been provided with a copy of the Department's decision notice dated 24 June 2008 from either Ernst Body Corporate Management or Archers Body Corporate Management Pty Ltd and he was not aware of the issue of that notice by the Department.

8. Based on these enquiries, I believe that the Department’s decision notice rejecting the objection to the 30 June 2008 valuation did not come to the attention of the Parklands' Bodies Corporate until on or about 12 January 2009, upon my return from leave.”

[11] Relying on the evidence of Mr Sindel it was submitted on behalf of the applicants that:

“... The letter was not apparently received by the previous Body Corporate manager who say they would have sent it on to the new Body Corporate manager. The new Body Corporate manager did not receive it. There can be no explanation for the non receipt of the letter. It cannot be found and there is no record of it being received.”<sup>5</sup>

[12] It is also submitted on behalf of the applicants that the applicants should not bear the consequences of non performance by their agent or agents.

[13] The respondent in part relied on the evidence of a Mr G Jacobsen, a Land Officer employed by the respondent. Mr Jacobsen carried out enquires which led him to believe that the notice of decision on the objection was posted to the postal address of the first managers. The evidence of Mr Jacobsen is also that unclaimed notices of the type involved here are returned to his office and brought to his attention. Mr Jacobsen did not receive any unclaimed notice and nor did anyone else in his office. The evidence of Mr Jacobsen was not challenged in any way.

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<sup>4</sup> Exhibit BJS-3.

<sup>5</sup> Paragraph 8 of the applicants' written submissions.

- [14] On balance I have reached the conclusion that it is more likely than not that the subject notice was issued by way of normal post addressed appropriately to and received by the first managers.
- [15] Before proceeding further with this matter I should deal with some specific submissions made by Mr Fynes-Clinton, counsel for the respondent. Mr Fynes-Clinton properly described this application as being substantive rather than procedural in character. And, that pursuant to s.(57)(1) a two step process is involved. First, the applicants must clearly put before the Court an excuse established by probative evidence upon which it relies for relief. It is only then that the next step arises, namely whether or not, in the facts and circumstances of the case, the excuse relied on is “reasonable”. I agree with this analysis.
- [16] Mr Fynes-Clinton submits further that in this application the applicants fail at the first hurdle because the evidence relied on is, in nearly all material respects, merely hearsay and applications such as this require direct evidence to establish the excuse relied on.
- [17] I have considerable sympathy for the approach advocated by Mr Fynes-Clinton. Save for those cases where the Court is satisfied that there are sufficient grounds for accepting hearsay evidence, applications such as this should be supported wherever practicable by direct evidence.
- [18] Section (7) of the *Land Court Act 2000 (LCA)* of course provides that the Land Court is not bound by the rules of evidence and must act according to equity, good conscience and the substantial merits of the case without regard to legal technicalities and forms or the practice of other Courts. Section (7) however does not provide a blanket excuse or basis for not putting before the Court probative evidence capable of being tested by the other side. It is well established that statutory provisions such as s.(7) of the LCA permits the Court to resort to common sense judgement in the circumstances of the case before it. However, that does not mean that the Court can act in an arbitrary way. It must still apply appropriate legal principles including the standard of being satisfied on the balance of probabilities.<sup>6</sup> The equity and good conscience provisions do not empower the Land Court or the Land Appeal Court to ignore established principles of law or to dispense justice other than in accordance with basic principles of natural justice to all parties.<sup>7</sup>
- [19] In re *Pochi and Minister for Immigration and Ethnic Affairs*<sup>8</sup> Brennan J stated:

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<sup>6</sup> *Townsville City Council v. Chief Executive, Department of Main Roads* (2006) 1QdR 77 at pp94-95 per Keane JA (CA).

<sup>7</sup> *Cox v. Commissioner of Water Resources* (1992) 14 QLCR 304 (LAC).

<sup>8</sup> (1979) 2ALD 33: Cited with approval in re Kevin & Minister for Capital Territory (1980) 2 ALD 238 per R Todd (Senior Member).

“Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, “bound by any rules of evidence”. Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of enquiry best calculated to prevent error and elicit truth. No Tribunal can, without grave danger of injustice, set them on one side and resort to methods of enquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence as such, do not bind, every attempt must be made to administer “substantial justice”. That does not mean, of course, that the rules of evidence that have been excluded expressly by the statute creep back through a domestic procedural rule. Facts can be fairly found without demanding adherence to the rules of evidence...”.

[20] In the course of his reasoning Brennan J cited with approval observations made by Depilock LJ in *RV Deputy Industrial Inquiries Commission, Ex parte Moore*<sup>9</sup> where his Lordship observed that the technical rules of evidence form no part of the rules of natural justice but a decision of the tribunal of fact must be based on evidence which is logically probative.

[21] I respectfully agree with the observations of Brennan J but it must be stressed that I am not attempting to formulate a test or rigid formula applicable to all applications brought in the Land Court. Each must be dealt with on its own facts, circumstances and merits.

[22] The force and effect of s.(7) of the LCA must not be construed in such a way as to limit the flexibility Parliament intended the Land Court to have in the exercise of its jurisdiction. However, in applications such as this and in many other cases no doubt, hearsay evidence, if admitted, runs the real risk of unfairly advantaging one party and disadvantaging the other. That is so because the evidence cannot be adequately challenged or otherwise tested.

[23] In this case, in circumstances where no attempt was made to put before the Court evidence as to why it was not practical to call direct evidence from the persons spoken to by Mr Sindel, there were strong grounds for objecting to the admissibility of much (if not all) of the evidence contained in paragraph 7 of Mr Sindel’s affidavit. However, in the absence of there being any express objection I will deal with the merits of this application of the evidence provided by Mr Sindel including the hearsay evidence contained in his affidavit.

[24] That said, at its highest the evidence merely reveals a number of possible scenario’s including:

- i. that the notice was not received by the first managers; or
- ii. the notice was received by the first managers and simply misplaced within their system; or

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<sup>9</sup> (1965) 1QB 456.

- iii. the notice was received by the first managers and forwarded onto Archers Body Corporate Management Pty Ltd (the second managers) with no record of the notice being received or forwarded; or
- iv. the notice was received by the second managers and misplaced in its system without its receipt being recorded.

No evidence has been advanced that either of the body corporate managers had any system in place for the supervision and management of such correspondence.

[25] Put simply, the evidence of Mr Sindel is to the effect that neither the applicants nor their agents have any real idea of what might have happened to the notice.

### **The case law**

[26] In *Stevens v Motor Vehicle Insurance Trust*<sup>10</sup> Burt CJ said in respect of legislation which gave the Court power to grant relief where it considered the “*delay was occasioned by mistake or reasonable cause*”:

“what one is looking for is some “cause” which a reasonable man would regard as sufficient, a cause consistent with a reasonable standard of conduct, the kind of thing which might be expected to delay the “taking of action” by a reasonable man...”

[27] It is significant that provisions such as s.57(1) of the VLA are meant to be remedial and ameliorative in nature. In *Director General, Department of Transport v. Congress Community Development and Education Unit Ltd*<sup>11</sup> the Land Appeal Court was concerned with the interpretation of legislation where there had been a late lodgement of a notice of appeal to the Land Appeal Court and late lodgement might be excused where there was “*reasonable cause or explanation.*” In his reasons Muir J said:

“In my view, the above authorities support the conclusion that for a reasonable excuse to exist it is not necessary that the conduct of the applicant (by itself or its agents) be blameless. The expressions under consideration are broad in meaning and quite apt to cover a “slip” of the nature of that made by the employee of the Crown Solicitor. One should not lose sight of the fact that the provision under consideration is remedial in nature, having been introduced in order to ameliorate the harsh consequences of a failure to comply with the requirements (of the Act)”<sup>12</sup> .

[28] In considering whether the “slip” involved in the circumstances of the case provided a reasonable excuse for the applicant His Honour had regard to the circumstance of the case and, in particular including<sup>13</sup>:

- That the lodgement took place on the first business day after the last day prescribed for the filing of the notice of appeal.
- Accordingly the delay was slight.

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<sup>10</sup> (1978) WAR 232 at 235.

<sup>11</sup> (1998) 19 QLCR 168.

<sup>12</sup> At 171.

<sup>13</sup> At 171-172.

- The applicant, by its agent, the Crown Solicitor, had put in train processes designed to affect the lodgement and service of the notice of appeal in time.
- The matter was entrusted to a Solicitor in the Crown Solicitor's office who took normal steps to ensure the carrying out of the applicant's instructions.
- Procedures were in place to ensure that time requirements such as lodgement dates were met.
- The procedures miscarried.

[29] In the circumstances of the case Muir J came to the conclusion that there was a reasonable explanation for non compliance. In this context His Honour said:

“... meanings for the expression “reasonable cause” and “reasonable excuse” given in the authorities referred to above cannot displace the actual words in subsection (11)(d) nor provide alternative statutory tests. Those authorities though, offer assistance in an assessment of whether any given conduct satisfies a statutory test but each application must be considered on its own merits and by reference to its own facts. In my view, the conduct discussed above is consistent with a reasonable standard of conduct. It is the kind of thing which might be expected to delay the “taking of action by a reasonable man”. An excuse is not necessarily unreasonable because the maker of the excuse has made a mistake or omitted to do something through an oversight or misapprehension as to a question of fact or law.”<sup>14</sup>

[30] The facts and circumstances in the *Congress Community* case stand in stark contrast to the facts in this case:

- The filing of the notice of appeal was out of time by months not one day. Accordingly the delay could not be said to be “slight”.
- There is no evidence that the agents of the applicants had put in place any process or system to properly deal with correspondence of the type involved here let alone any evidence of processes or systems designed to affect lodgement of a response to the notice within the statutory time limit.
- No instructions concerning the filing of an appeal were even given because the applicants were not aware that the decision notice had issued.<sup>15</sup>

[31] As stated above I have found that it is more likely than not that the notice was delivered to the first agent's address by ordinary post. Thereafter, to adopt the words used by Mr Fynes-Clinton, “*what happened to it after that is a mystery*”.

[32] I have also concluded that the submission made on behalf of the applicants to the effect that the consequences of any fault of their agents should not be visited upon them. In the *Congress Community* case the other Members of the Court agreed that, in the circumstance of that case, the application should be allowed but went on to say:

“... that does not imply however that, in our opinion, there was a reasonable excuse for the conduct of the solicitor to whom the applicant had entrusted the institution of the

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<sup>14</sup> At 172.

<sup>15</sup> Mr Sindel's affidavit, para 7.4.

appeal. The reasonable cause and explanation of the lateness of the service and lodgement of the notice and payment of the prescribed fee is, in our opinion, the fact that the solicitor failed in the duty entrusted to her. The applicant had done everything that should have been expected of him.”<sup>16</sup>

[33] If by that statement the learned Members meant to convey that provided the applicant engaged an appropriate agent and given appropriate instructions, that will save the applicant in all cases where the agent has failed to carry out the duty entrusted to him then I must respectfully disagree. I prefer the reasoning of Muir J which requires all of the relevant facts and circumstances of the case to be considered in determining whether or not reasonable excuse has been established and, the expression “*reasonable excuse*” is broad enough in its meaning to cover a “*slip*” made by the applicant’s agent.<sup>17</sup> In this regard in *Union Fidelity Trustee Company v. The Coordinator General*<sup>18</sup> the Land Appeal Court said:

“It must not be thought that in this case the Court is imposing any rigid formula as to what is or is not reasonable cause or reasonable explanation. Each case will be decided on its own facts.”

[34] In any event, the reasoning of Mr Wenck and Dr Divett do not assist in this case. There is no probative evidence that would support a finding that “*the applicants had done everything that should have been expected by (them)*”. In this context I note that Mr Sindel did not receive instructions from the applicants to instigate an appeal until 12 January 2009. That is of course several months after the time prescribed by s.45 had passed.

[35] No reasonable explanation for the delay in the filing of the notice of appeal has been given. A reasonable excuse under s.57(1) of the VLA has not been established and accordingly the Court does not have the jurisdiction to hear the appeal.

[36] Before making final orders deposing of this application I should deal with one further matter. During final addresses I raised with Mr Cronin, counsel for the applicants, the issues raised in paragraph 9 of his written submissions. This submission argues to the effect that it was acknowledged that much of the evidence relied on was hearsay and, if the Court thought that more direct evidence was desirable, the hearing of the application could be adjourned for appropriate affidavits and subpoenas to be arranged. Upon being asked directly whether or not he wished to have the hearing adjourned to allow for those procedures to take place Mr Cronin originally sought an adjournment.<sup>19</sup> However, that

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<sup>16</sup> At 173 per Mr Wenck and Dr Divett.

<sup>17</sup> This was the approach preferred by Trickett P in *Trust Company of Australia Ltd v. Department of Natural Resources and Water* (2007) QLC 0045.

<sup>18</sup> (1988 – 89) 12 QLCR 153 at 163.

<sup>19</sup> Transcript T17.

application was later withdrawn<sup>20</sup> and the hearing of the substantive application continued on the evidence then before the Court.

**Orders**

- [36]
1. The application is refused.
  2. The court does not have jurisdiction to hear appeal AV2009/0010.
  3. I will hear from the parties as to costs.

**RS JONES  
MEMBER OF THE LAND COURT**

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